

N.D.A.G. Letter to Quast (March 14, 1990)

March 14, 1990

Mr. Larry Quast
Stanton City Attorney
P.O. Box 249
Beulah, ND 58523

Dear Mr. Quast:

Thank you for your letter of December 21, 1989, regarding a new business tax exemption that the city of Stanton granted under N.D.C.C. ch. 40-57.1 for Avie's Drive In which is owned by Avaline Peterka.

From your letter and its enclosures, which includes a November 17, 1989, letter you received from Robert W. Wirtz, chief counsel for the Tax Commissioner, as well as a January 17, 1990, letter I received from Ms. Peterka, it is my understanding that the project operator, Ms. Peterka, took possession of the subject property and commenced business in June of 1989. The application for the new business tax exemption was made in July of 1989 and the property was subsequently purchased by Ms. Peterka in August of 1989.

Although the city of Stanton granted the new business tax exemption, you have been informed that Mercer County will not honor the exemption based upon a July 1, 1989, guideline of the Tax Commissioner which provides that an application cannot be granted if it is made after the project operator takes possession of an existing structure. This condition which has been imposed in the guideline is not contained in the statute authorizing the exemption. N.D.C.C. § 40-57.1-04.1.

You would like my opinion as to whether there is a legal basis for the guideline and whether Mercer County may rely upon it or if the granting of the exemption is solely within the discretion of the city of Stanton.

Upon reviewing Mr. Wirtz's letter, I agree with his conclusion that there is statutory authority for the Office of the Tax Commissioner to issue guidelines related to the ad valorem taxation of property. N.D.C.C. §§ 57-01-02(2)(3)(7)(8) and 57-01-05(1)(6)(7). I further agree that the guideline in question is consistent with the express legislative intention that the new business tax exemption was enacted for the purpose of encouraging the development of new businesses in the state.

With respect to your suggestion that the granting of the exemption is solely within the discretion of the city of Stanton, it must be noted that the North Dakota Constitution grants the Legislature the power to create and control the government of cities and that cities "have only the powers expressly conferred upon them by the Legislature, or [powers

which are] necessarily implied from "expressly granted powers. Dakota Land Company v. City of Fargo, 224 N.W.2d 810, 813 (N.D. 1974) These same limitations apply to counties and the Office of the Tax Commissioner. See, County of Stutsman v. State Historical Society, 371 N.W.2d 321, 329 (N.D. 1985); First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-85 (N.D. 1984); American Federal of State, County, and Municipal Employees v. Olson, 338 N.W.2d 97, 100 (N.D. 1983) (public officials have only that authority expressly granted by the constitution and statutes and necessarily implied by the express grant).

Since cities, counties and state agencies all receive their power and authority under the State Constitution and Legislative enactments, there is no separation of powers question in this matter. Therefore, the city of Stanton may grant a new business tax exemption only if it is authorized under N.D.C.C. ch. 40-57.1.

The Office of the Tax Commissioner may supervise the administration of property tax exemptions and a county has the authority to initiate a proceeding to correct an assessment if an exemption was improperly granted. N.D.C.C. chs. 57-01, 57-12 and 57-14. Shark Bros, Inc. v. Cass County, 256 N.W.2d 701 (N.D. 1977). In conclusion, the city of Stanton should have followed the guidelines issued by the Office of the Tax Commissioner when it considered the application for a new business tax exemption that was filed in behalf of Avie's Drive In.

I trust this information aids your understanding of this issue .

Sincerely,

Nicholas J. Spaeth

vkk

cc: Avaline Peterka